Supreme Court of the United States

OCTOBER TERM, 1966

No. 668

FEDERAL TRADE COMMISSION, PETITIONER

vs.

FLOTILL PRODUCTS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

[fol. 62]

BEFORE FEDERAL TRADE COMMISSION

Docket No. 7226

COMMISSIONERS:

PAUL RAND DIXON, Chairman
PHILIP ELMAN
EVERETTE MACINTYRE
JOHN R. REILLY

IN THE MATTER OF

FLOTILL PRODUCTS, INC., a corporation, MRS. MEYER L. LEWIS, ALBERT S. HEISER, and ARTHUR H. HEISER, individually and as officers of said corporation.

FINAL ORDER—June 26, 1964

This matter having been heard by the Commission upon cross-appeals from the hearing examiner's initial decision and upon briefs and oral argument in support of and in opposition to said appeals; and

[fol. 63] The Commission having determined for the reasons stated in the accompanying opinion that the appeal of counsel supporting the complaint should be granted in part and denied in part, that respondents' appeal should be denied, and that certain of the hearing examiner's findings as to the facts and conclusions should be modified to conform to the views expressed in said opinion:

It is Ordered that the initial decision be modified by striking findings numbered 6 through 17 and substituting therefor that part of the accompanying opinion beginning on page 20 with the words "The complaint names" and ending on page 21 with the words "and we so hold."

It Is Further Ordered that the initial decision be modified by striking therefrom the findings numbered 35 and 52.

It Is Further Ordered that the initial decision be modified by striking therefrom conclusion numbered 6 on page 35 and substituting therefor the following:

6. The circumstances of this case warrant the conclusion that the order to cease and desist should be directed against respondents Mrs. Meyer L. Lewis, Albert S. Heiser and Arthur H. Heiser in their individual capacities as well as in their capacities as officers of the corporation.

It Is Further Ordered that the initial decision be modified by striking the order of pages 35 and 36 and substituting therefor the following:

It Is Ordered that respondents Tillie Lewis Foods, Inc. (formerly Flotill Products, Inc.), a corporation,
[fol. 64] and Mrs. Meyer L. Lewis, Albert S. Heiser, and Arthur H. Heiser, individually and as officers of said corporation, and respondents' officers, agents, representatives and employees, directly or indirectly, through any corporate or other device, in or in connection with the sale of canned fruits and vegetables in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

1. Paying, granting or allowing, directly or indirectly, to Nash-Finch Company, or to any other buyer, or to anyone acting for or in behalf of, or who is subject to the direct or indirect control of any such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of respondents' products to any such buyer for his own account.

2. Paying or contracting for the payment of anything of value to or for the benefit of any customer of respondents as compensation or in consideration for any services or facilities furnished by or through such customer, in connection with the offering for sale, sale or distribution of any of respondents' products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products with the favored customer.

It Is Further Ordered that, with the exception of findings numbered 105 through 110 which have not been re-
[fol. 65] viewed, the initial decision, as modified, be, and it hereby is, adopted as the decision of the Commission.

It Is Further Ordered that respondents Tillie Lewis Foods, Inc. (formerly Flotill Products, Inc.), Mrs. Meyer L. Lewis, Albert S. Heiser and Arthur H. Heiser shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist set forth herein.

By the Commission. Commissioner Elman's views are set forth in a separate opinion. Commissioner MacIntyre dissented in part. Commissioner Reilly did not participate for the reason he did not hear oral argument.

/s/ Joseph W. Shea,
JOSEPH W. SHEA,
Secretary.

Issued: June 26, 1964

* * * *

[fol. 66]

BEFORE FEDERAL TRADE COMMISSION

Docket No. 7226

COMMISSIONERS:

PAUL RAND DIXON, Chairman
PHILIP ELMAN
EVERETTE MACINTYRE
JOHN R. REILLY

IN THE MATTER OF

FLOTILL PRODUCTS, INC., a corporation, et al.

OPINION—June 26, 1964

By DIXON, *Commissioner:*

The complaint in this matter charges the corporate respondent [1] and three of its principal officers with violating [fol. 67] Section 2(c) [2] and Section 2(d) [3] of the Clayton

---

[1] In June 1961, the name of the corporate respondent was changed to Tillie Lewis Foods, Inc.

[2] Section 2(c) provides: "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

[3] Section 2(d) provides: "That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

Act, as amended, in the sale of canned fruits and vegetables. The hearing examiner sustained the Section 2(d) charge and that aspect of the Section 2(c) charge relating to corporate respondent's dealings with the Nash-Finch Company. He further held that respondents' dealings with field brokers did not violate Section 2(c) and that the persons named as respondents in the complaint should not be held in their individual capacities for the violations found to exist. The case is before us on cross-appeals.

The proceeding is concerned with three separate factual complexes, two alleged to involve the payment of brokerage or allowances in lieu thereof in violation of Section 2(c) and one the payment of disproportionate promotional allowances prohibited by Section 2(d). Because they are essentially unrelated, the three situations were afforded seriatim treatment by the hearing examiner and such will be our course here.

Respondents' Dealings with Field Brokers

The facts as to these transactions are not seriously disputed and the hearing examiner's findings with respect thereto are carefully and accurately drafted. The issue arises from his application of the law to these facts.

[fol. 68] Traditionally a field broker operates in the geographic area in which, as in this case, the canners, such as Flotill, are located. He maintains close contact with all canners in his area, including many small firms whose product lines are limited or who may operate only for short periods of time during the year. These small canners are restricted in the distribution of their products by their inability to maintain a sales force and by their inability to fill large orders and make available the lower rates obtainable by shipping in carload lots. The function of a field broker is, in effect, to compensate for these limitations by providing a selling organization to enable the small canner to effect the economies of mass selling and distribution available to his large competitor.

In performing his function, the field broker usually operates through a local broker who is located in the same area as the purchasers and who deals directly with them. Occasionally, the field broker deals directly with the pur-

chaser, usually a wholesale grocer or a large retail chain organization. Of importance in this relationship is the fact that the local broker and the purchaser are generally located at considerable distances from the canners. A small canner, with a limited or no sales force, is thus unable to make known to these potential purchasers information concerning his production capabilities and the stock which he has available. On the other hand, the field broker, by reason of his location and constant contact with all canners in his area, maintains this information on a current basis. Through bulletins, letters and principally by telephone, he relays this information regularly [fol. 69] to numerous local brokers. The field broker, upon receipt of an order from a local broker or direct purchaser, may split the order up among several small canners and coordinate the pooling of each canner's share in shipment to the purchaser. The seller compensates the field broker for these services by a commission which is usually indicated as a deduction on the invoice. Generally, the rate of this commission is either 4% or 5% depending on the type of commodity involved. The local broker usually receives half of the field broker's commission, either 2% or 2½%, and, in those instances in which a local broker is not used, the field broker retains the full commission.

Complaint counsel argue that the transactions between Flotill and its field brokers are actual sales, thus making the field broker the "other party to such transaction" to whom, under Section 2(c), the seller is barred from paying "anything of value as a commission, brokerage, or other compensation." Their contention is based on the fact that Flotill invoices the field brokers and looks to the field brokers for payment, and upon the testimony of certain witnesses, including a Flotill official, that title to the goods passes to the field brokers. This latter issue, that of title passage, has been the principal subject of controversy throughout this aspect of the proceeding, respondents' position being that the field broker acts in the capacity of a del credere agent.

We have given careful consideration to the facts of record which detail the relationship between Flotill and its field brokers. In summary, these facts are as follows.

[fol. 70] The field broker operates from a small office, maintains no warehousing or handling facilities, and never takes possession of any goods. Usually at the beginning of the packing season, the local broker estimates the future needs of the customers in his area and forwards this information to the field broker. He, in turn, places a reservation with Flotill which, in effect, merely serves as a guide as to what should be canned for the season and is in no way binding on any customer. Upon receiving a specific order from a customer through the local broker, during or after the packing season, the field broker forwards the order to Flotill. In this connection, it is the testimony of respondents' principal field broker, A. M. Beebe Company that from 90% to 95%of the business it places with Flotill is for goods under the purchaser's private label. Thus, when the order has been confirmed, the purchaser forwards his labels directly to Flotill. At the time the order is placed or shortly thereafter, the field broker issues shipping instructions to Flotill. These instructions give the name and location of the customer and the method and time of delivery.

In many instances, goods of other canners are needed to fill a freight car and thus avoid the expense of less than carload shipments. The field broker, usually working with the local broker, will perform the necessary paperwork and issue instructions to the canners and to the carrier in order to combine shipments. Flotill products are loaded on the car by Flotill employees. Upon completion of the loading, the goods are shipped directly to the ultimate purchaser, never to the field broker. Upon [fol. 71] shipment, Flotill sends directly to each purchaser having goods loaded in the car, a copy of the shipping manifest (the original is placed in the car) listing the merchandise shipped, showing the order in which it is loaded, and bearing Flotill's name as the canner. All three of Flotill's field brokers testifying herein stated that the goods become the purchaser's inventory when shipped, and that the purchaser may borrow money thereon at that time. Moreover, they testified that at no stage of the transaction could they borrow money on this merchandise.

As to the method of billing for the goods, the three field brokers testified that Flotill bills them at the time the goods are shipped.[4] It is the testimony of one of the field brokers that the bill he receives from Flotill is usually accompanied by the shipping documents. The field broker then remits payment to Flotill[5] and at that time or shortly thereafter, bills the ultimate purchaser at the same price he paid Flotill. The Beebe representative testified that his company "just make(s) a transcript of the canner's invoice," passing on the same price to the ultimate buyer. In this regard, it is to be noted that the billing form used by the A. M. Beebe Company bears in its heading the wording "Accommodation Billing For Account Of Seller."

[fol. 72] In billing the purchaser, the field broker passes on all discounts and allowances granted by the canner, including any cash discount for prompt payment as well as any price adjustments due to market fluctuations. In this latter regard, the evidence discloses that the prices on canned goods fluctuate rapidly. Shown in the record are two instances of price reductions in the sale of certain canned goods between the time Flotill billed Beebe and the time that Beebe billed the purchaser. Beebe billed the purchaser at the lower of the two prices and received credit from Flotill for the difference.[6]

The record discloses a few instances in which a field broker, Harcourt-Greene Company, billed the purchaser at a slightly higher price than the field broker was billed by Flotill. This field broker testified that the slight increase was to compensate for additional expenses incurred in handling paperwork on certain small orders. However, there is no evidence that Flotill's principal field broker or its other field broker who testified herein ever billed goods to the purchaser at either higher or lower prices.

---

[4] Tr. 533, 1164, 1263.

[5] It appears from the testimony of one of the field brokers that on some occasions the field broker pays the canner in advance of shipment in order to enable small canners in need of financing to have their goods released from a warehouse.

[6] RX 12 k-n, 16 p-t.

The hearing examiner concluded that these few instances were not typical of any substantial portion of Harcourt's business. Moreover, he found that these instances represent sharp departures from the method of operation of field brokers. From our review of the record, we fully agree with the examiner's finding, and, in view of the importance of the question of the legality of the normal operation of field brokers, we feel that in making a de-[fol. 73] termination on this question in this case these isolated instances should be disregarded.[7]

It is, of course, well settled that Section 2(c), while permitting a seller to compensate a broker for services actually rendered on the seller's behalf, bars the direct or indirect payment of brokerage to a person buying on his own account for resale. As it is undisputed that Flotill pays brokerage to its field brokers, we must determine whether these field brokers are actually performing a service for Flotill in sales to others or whether they are in fact buying on their own account for resale.

Complaint counsel cite a number of so-called "buying broker" cases in which we have held that brokerage paid to brokers buying and reselling on their own accounts contravenes the statute. In those cases, however, the evidence was such as to clearly establish that ownership of the goods vested absolutely in the brokers. As an example, in the Southgate case,[8] the goods were shipped to the broker who stored them in his own warehouse, paid insurance and taxes thereon, resold the goods at prices and on terms which it alone determined, filed claims in its own name against the carrier for loss or damage in transit, and made a profit or sustained a loss on each [fol. 74] transaction depending upon market conditions subsequent to its contract with the seller. In the recent

---

[7] If the evidence were otherwise and it were established that a field broker customarily bills purchasers at a price higher than he pays Flotill, such fact might well support a conclusion that such field broker is acting for and on behalf of himself in his dealings with canners.

[8] Southgate Brokerage Co. v. Federal Trade Commission, 150 F.2d 607 (4th Cir. 1945).

Western Fruit Growers case,[9] the seller-buyer relationship was established by evidence that the goods were shipped directly to the brokers, the shipper lost control thereof after shipment, the brokers customarily invoiced their purchasers at prices higher or lower than the prices invoiced by the suppliers and, in the event the broker had to sell at a lower price, the broker sustained the loss.

The circumstances surrounding the course of dealing in those and other buying broker cases clearly established that the broker was in fact the "other party" to the transaction. The facts as we have detailed them with respect to Flotill's dealings with field brokers are to the contrary. While Flotill bills and receives payment from the field brokers, none of the indicia of actual ownership of the goods by the field brokers are present but, in fact, are negated. Viewed as a part of the entire transaction from the time of the placing of the order by the ultimate purchaser until delivery of the goods to him, we find that technical title passage, if such be the case, would not be conclusive but would be merely incidental to the services performed by the field broker for the canner.

The facts in this record establish that these field brokers do not purchase for their own account, but function as intermediaries on behalf of Flotill in its sales to other [fol. 75] parties. As such, they are entitled to brokerage commissions paid by the seller. Complaint counsel's appeal on this issue is therefore denied.

The Alleged Brokerage Payments to Nash-Finch

In addition to Flotill, the dramatis personnae involved in the second alleged violation of Section 2(c) are Nash-Finch Company, a large wholesale grocer with its headquarters in Minneapolis, Minnesota, and Bushey & Wright, Inc., a food broker.

Nash-Finch Company operates approximately fifty-six wholesale branches in eight midwestern states. Its volume of sales in a recent year approximated $125,000,000. While most items sold are purchased from others, the

[9] Western Fruit Growers Sales Co. v. Federal Trade Commission, 322 F.2d 67 (9th Cir. 1963), cert. denied, 376 U.S. 907 (1964).

company does produce its own vacuum-packed coffee in a plant which it wholly owns. Products are principally sold to retail grocers, but sales are also made to hotels and restaurants. A substantial portion of the food items sold by Nash-Finch is labeled with its private brands or private labels, "Our Family" and "Golden Valley."

Bushey & Wright is a large brokerage establishment, operating offices in Boston, Chicago, and San Francisco. Its selling areas are located primarily in the East, in New York State, New England, and in the Southeastern states. Bushey & Wright owns two private labels, "Blue and White" and "Red and White."

Bushey & Wright has acted as a broker for canners and processors selling to Nash-Finch for many years. One witness testified that there is a personal relationship between the two firms, going back to the time when Nash-[fol. 76] Finch was a part of Bushey & Wright. The respondent Flotill is a substantial supplier of canned fruits and vegetables to Nash-Finch; however, only a very small percentage of its sales to this customer in recent years has been made through Bushey & Wright. By far the greater number of sales during this period was negotiated directly with Nash-Finch without the service of Bushey & Wright or any other broker. Concerning the transactions by and among Flotill, Bushey & Wright and Nash-Finch during the years 1954 to 1958, the record contains the following figures:

Year	Total Sales to Nash-Finch	Commissions Paid to Bushey & Wright	Estimated Sales to N-F through B & W
1954 (last half)	$ 67,006.55	$281.21	$11,248.00
1955	197,910.94	226.84	9,073.00
1956	569,994.43	358.14	14,325.00
1957	764,573.75	n.a.	n.a.
1958	734,745.23	n.a.	n.a.

(The figures showing the estimated sales to Nash-Finch upon which Bushey & Wright received commissions were calculated from the figures showing the commissions paid, which commissions were usually at the rate of 2½ percent. The great bulk of the respondents' sales to Nash-Finch

(95 to 99 percent) bore the buyer's private labels, "Our Family" or "Golden Valley.")

The record shows that on many of the sales made directly to Nash-Finch Flotill has granted to this purchaser a price reduction or allowance equivalent in amount to the [fol. 77] normal brokerage fee paid to brokers on sales to other purchasers in which brokers' services have been utilized.[10]

The facts concerning the allowances are not complicated. The record shows that Nash-Finch's purchases from Flotill increased sharply during the last six months of 1955. Sales in the twelve months prior to June of 1955 totaled less than $80,000. Sales for the next six months, that is, the last half of 1955, exceeded $185,000. There is no complete explanation in the record for the sudden preference for Flotill's products.

At one place in their briefs, complaint counsel contend that Bushey & Wright was paid the usual brokerage rate of 2½ percent on the Nash-Finch purchases from Flotill during the period 1954 through 1958, but this is not correct. As found by the hearing examiner, by far the majority of the purchases in question were made directly from Flotill without the intervening sales aid of Bushey & Wright and on these purchases the broker received no compensation whatsoever. This was true as early as the last six months of 1954, for, as the record shows, Bushey & Wright received only $281.21 in brokerage on Nash-Finch's purchases, totaling $67,006.55, during that period. Bushey & Wright received no brokerage at all on Nash-Finch's purchases of $12,626.25 during the first six months [fol. 78] of 1955. The record is silent as to when Nash-Finch began dealing directly with Flotill without the aid of a broker, but from the foregoing it can be seen that this course of dealing began sometime prior to the last half of 1954.

---

[10] Although respondents take issue with the hearing examiner's finding that the 2½ percent allowance is equivalent to the customary brokerage commission paid by Flotill on sales to Nash-Finch through Bushey & Wright, this fact is clearly established in the record. Both the Flotill and the Bushey & Wright representatives testified directly to this effect. (Tr. 234, 962.)

On December 1, 1955, Flotill commenced giving a 2½ percent allowance or price reduction to Nash-Finch on all items purchased, i.e., on total purchases regardless of label. The allowance was tendered in the form of credit memoranda issued at irregular periods. The first of the credit memoranda issued April 3, 1956, and credited Flotill's account $401.86 as a "special promotional allowance" of 2½ percent on $16,074.23 purchases during the month of December 1955. A second memorandum issued July 12, 1956, in the amount of $3,218.22 covered purchases during the first six months of 1956. On October 19, 1956, a third credit memorandum, in the amount of $6,209.29 was issued, allowing credit at 2½ percent for purchases made during July, August and September of 1956. On December 10, 1956, a fourth credit memorandum issued, granting allowances in the amount of $2,122.96 on purchases made during October and November of 1956. The total amount received by Nash-Finch from Flotill during the first twelve months of this arrangement totaled $11,952.33. As stated, it is complaint counsel's contention that this amount represents a payment or allowance in lieu of brokerage. It is respondents' contention that the true nature of payments is, as described on the credit memoranda, a "special promotional allowance."

There is, of course, nothing unlawful in a seller making direct sales to a buyer even though he utilizes brokers [fol. 79] in selling to other buyers. And it has been held that a seller may discharge his brokers and commence selling directly to all customers, passing on to them the savings engendered by the elimination of brokerage commissions.[11] However, that is not the situation in this case and we must decide whether the allowance given to Nash-Finch was produced by a savings in brokerage expense due to Flotill's direct dealing with the account. If that were the case, the allowance is unlawful, for "[a] price reduction based upon alleged savings in brokerage expenses is an 'allowance in lieu of brokerage' when given only to favored customers." Federal Trade Commission v. Henry Broch & Co., 363 U.S. 166, 176 (1960).

---

[11] Robinson v. Stanley Home Products, Inc., 272 F.2d 601 (1st Cir. 1959).

The record does not reveal the proportion of Flotill's total sales which are made through brokers. It would appear, however, that a substantial part of their business is so transacted, for they utilize the services of more than 100 food brokers. But, as noted, there was an undetermined time lapse between the institution of direct dealings between respondents and Nash-Finch and the payment of the questioned allowances. Thus, a finding that the allowances were unlawful discounts in lieu of brokerage must depend upon an inference drawn from all the facts and circumstances. Quite obviously such an inference could be more easily drawn had the first payment occurred simultaneously with the discontinuance of Bushey & Wright as a full-time broker, as erroneously [fol. 80] contended by complaint counsel. But the time lapse is not destructive of the reasonableness of the inference, as respondents argue, for our decision must be based upon all the facts without undue emphasis to any one. A fact tending to support the inference is the mathematical identity of the allowance and the brokerage paid on sales to many other customers. Moreover, while Flotill did grant promotional allowances to other customers, a company official testified that its arrangements with Nash-Finch were unique and that it was the only customer receiving a 2½ percent allowance on all purchases.

Only one witness testified in any detail with respect to the facts surrounding the agreement to pay the allowance to Nash-Finch. This witness had been the vice-president in charge of grocery merchandising for Nash-Finch during the relevant 1954-1958 period. The witness testified that the allowance was granted to Nash-Finch at his request. He stated that Nash-Finch was spending a good deal of money promoting its "Our Family" brand of goods. In response to his request to a Flotill official for "some help," Flotill agreed to pay 2½ percent of its gross sales to Nash-Finch as an "advertising and promotional allowance." He first testified that brokerage was never discussed in connection with the negotiation and was not a part of "our thinking" but subsequently he stated ". . . when we made the arrangement with Flotill for the advertising and promotional allowance, it was agreed that there

was no element of brokerage in the deal to us, to Bushey and Wright, or to anyone else, we were to use that money for promoting Our Family and Golden Valley brands in [fol. 81] our territory. . . ."—"Eliminating the brokerage feature deprived Bushey and Wright—the Bushey and Wright office, of the brokerage income that they had had on this Flotill business prior to the agreement. . . ." He was then asked why it was decided to eliminate Bushey & Wright as a broker and responded, "Because there are certain advantages in pooling our specifications with one canner who was a full-line canner, as Flotill is. There are economies in it for him. There are economies in it for us. I didn't make any decisions as to whether they should discontinue paying brokerage to Bushey and Wright, or not. I just asked for an advertising and promotional allowance and said, 'We will deal directly with you.'" This witness was later asked point-blank whether he felt that the fact that Nash-Finch dealt directly with Flotill rather than through an intervening broker accounted for the promotional allowance received. He responded, "Well, I think the fact we were buying directly represented economies to them, a convenience to them, and a sure outlet for their goods. . . ." He stated that he had no ability to give a "definite answer" on the question of whether the Flotill "economies" included the saving of the normal 2½ percent brokerage commission.

Respondents' position, in effect, that the discount was granted as a valid promotional allowance within the exception of the "services rendered" clause of Section 2(c) must be rejected.

The evidence in support of this contention consists of a showing that on Flotill's credit memoranda to Nash-Finch, the payments were noted as "special promotional allowances," together with testimony that the funds were placed in Nash-Finch's advertising and promotion account [fol. 82] and that from time to time advertising tear sheets and handbills were sent to Flotill and the merchandise program was discussed with them. Additionally, there is testimony that in requesting the allowance, Nash-Finch discussed with Flotill the fact that Flotill's competitors, principally California Packing Corporation (Cal-

Pack) and Libby, McNeill & Libby (Libby), were granting promotional allowances on sales of their own brands to Nash-Finch.

On the other hand, it is undisputed that Nash-Finch was spending a substantial sum of money in advertising its "Our Family" line of goods prior to receiving the discount from Flotill. Although Flotill's sales of "Our Family" items to Nash-Finch increased considerably after the granting of the discount, there is nothing in the record indicating that Nash-Finch increased the percentage of its promotional expenditures after receiving the discount. It is significant also that Flotill was not the exclusive supplier of the Nash-Finch brands and that use of this discount to promote those brands would inure, in part, to the benefit of other canners. Moreover, both Cal Pack and Libby had granted Nash-Finch promotional allowances "for a great many years" prior to the discussion of Nash-Finch's representative with Flotill and, as found by the examiner, there is no reasonable relationship between the allowance Nash-Finch received from Flotill and that which it received from the other two companies.

A comparison of the details of Flotill's Nash-Finch arrangement with its customary promotional deals further [fol. 83] indicates the true nature of the Nash-Finch transaction. It was Flotill's usual practice to confine its promotional allowances to a single product or to a limited geographical area. As an example, respondents' representative testified that his company was at that time in the process of granting a promotional allowance on one product—catsup. In its dealings with Nash-Finch, however, Flotill granted discounts on the purchase of all Flotill products for the entire eight-state area in which Nash-Finch operates. Also, the manner in which this allowance was paid to Nash-Finch represented a departure from Flotill's other method of paying allowances as shown in the record. In granting a promotional allowance of one percent to certain customers in the Boston area, Flotill issued a "Credit Memorandum," crediting the account of these customers with an allowance based on their purchases for a calendar year.[12] In contrast, the Nash-Finch

[12] CX 40, 52.

representative testified that "When we needed some advertising and promotional money and we had some coming from Flotill, I would write a letter and say that the advertising and promotional allowance on purchases from this date to this date are due us, and they would remit." [13]

Finally, despite the relative magnitude of the discount to Nash-Finch, Flotill had no arrangement with that company for an accounting and, in fact, never requested such an accounting.

In summary, the evidence discloses no economy to Flotill [fol. 84] in its method of selling to Nash-Finch other than selling directly without brokerage expense. Moreover, the evidence negates a finding that in return for the allowance, Nash-Finch actually performed any services other than those which it usually performed for itself. The evidence supports a finding that the allowance was granted as a result of pressure by Nash-Finch, a large wholesaler purchaser, who advised Flotill to the effect that "If you are going to continue to enjoy our business and if you are going to be the principal source of our supply, we have to have some help from you."

It is our conclusion that the 2½ percent allowance granted by the respondents to Nash-Finch reflected the savings in brokerage expenses which the respondents had theretofore incurred in selling to Nash-Finch and that, therefore, the allowance was "in lieu of brokerage" and unlawful.

The One Percent Payment to Bushey & Wright

Bushey & Wright for a number of years had served as a broker for canners other than Flotill in sales to Nash-Finch. With the exception of one canner, California Packing Corporation, these canners paid Bushey & Wright the usual brokerage commission of 2½ percent. The majority of the sales by these other canners to Nash-Finch were in less than carload lots. As it was prohibitively expensive to ship less than a full carload of merchandise, Bushey & Wright, as a part of its normal brokerage service to these canners, arranged for the pooling of their

[13] Tr. 922, 923.

shipments into one car. It appears that one car destined only for Nash-Finch might contain the merchandise of as many as twelve canners.

[fol. 85] The organizing and scheduling of pool cars requires skill and specialized service. Bushey & Wright had performed this operation as a part of its brokerage service for canners in sales to Nash-Finch for a number of years. Although some time prior to 1954 Flotill began selling directly to Nash-Finch, the majority of its sales continued to be in less than carload quantities and both parties desired the pool car services of Bushey & Wright. Bushey & Wright was willing to and did provide this service for these parties for a substantial period of time without compensation.[14]

In early 1956, within a month or two after the initiation of the 2½ percent payments to Nash-Finch, both Flotill and Nash-Finch officials decided that Bushey & Wright should be compensated for the large amount of paperwork which the pool car service entailed. It was agreed that both parties would contribute to the fee to be paid this broker upon shipments on which it performed the service of including Flotill goods in a car destined for Nash-Finch. On such shipments the 2½ percent allowance to Nash-Finch would be reduced to 2 percent. Flotill would take this withheld ½ percent, together with another ½ percent contributed by it, to make up the full 1 percent to be paid to Bushey & Wright.

[fol. 86] This procedure was placed into operation in January of 1956. The record reveals that by far the greater number of Flotill's shipments to Nash-Finch thereafter was in less than carload amounts, with Bushey & Wright performing the pool car service on such shipments. During the first six months of 1956, Nash-Finch received the so-called "special promotional allowance" upon purchases totaling $156,323.37. Of this total, only

---

[14] The Bushey & Wright representative testified that it performed its service without pay on Flotill shipments to Nash-Finch because it received its regular brokerage commission on sales by other canners to Nash-Finch included in the car and because providing this service created a better relationship with Nash-Finch for future business.

$18,349.89 was shipped without using the pool car service of Bushey & Wright.

Complaint counsel contend that the 1 percent fee paid Bushey & Wright constitutes brokerage paid by the seller to an agent of the buyer. It is our conclusion that the hearing examiner's rejection of this contention is correct. As we view it, the payment of the 1 percent to Bushey & Wright by Flotill constituted no more than payment of brokerage to the seller's broker for a service which is normally performed by such brokers. And the fact that Flotill deducted one-half of this 1 percent from the 2½ percent theretofore allowed to Nash-Finch on its purchases did not change the nature of the payment. When a seller reduces the amount of an unlawful allowance to a buyer, transferring the withdrawn money to a broker, he is lessening his violation, not enhancing it.

The 2(d) Charge

Under Section 2(d) of the amended Clayton Act, the respondents are charged with having discriminated between competing buyers by granting advertising or promotional allowances to some which were not made available on proportionally equal terms to others.

[fol. 87] Complaint counsel confined their proof to dealings which respondents had with customers reselling their products in the greater Boston, Massachusetts, area during the years 1956 and 1957. Two of respondents' customers operating in that trade area received promotional allowances, while five of their competitors did not.

Elm Farm Foods Company is one of the favored customers. This retail grocery chain operates supermarkets in New England, with about twenty-five or thirty of its stores located in the Boston area. It made substantial purchases from Flotill during the years 1956 and 1957, and on such purchases received a promotional allowance equal to 1 percent of total purchases. In addition, it received a lump sum payment of $1,000 from the respondents in the fall of 1956.

The other favored customer was Stop & Shop, Inc., a retail grocery chain operating in New England. Forty or fifty of its stores are in the greater Boston area. The only promotional payment received by this customer in

1956 and 1957 was a 1 percent allowance on its total purchases from Flotill during the year 1956. The grocery sales manager of this company, responsible for buying and selling groceries, testified that he was not aware that Flotill offered to pay his company a promotional allowance at any time during the year 1957, nor was the company offered any payments equivalent to or proportionally equal to the $1,000 paid to Elm Farm in 1956. The record further shows that Stop & Shop and Elm Farm competed in the resale of Flotill products.

[fol. 88] Thus, the evidence clearly establishes that Elm Farm and Stop & Shop were not afforded proportionally equal treatment by Flotill in the payment of advertising allowances. While these unlawful transactions alone are sufficient to justify an order to cease and desist, the record indicates that Flotill sold to several other retail companies doing business in the Boston area in competition with Elm Farm and Stop & Shop. Since these companies received no allowance of any nature, the 1 percent allowance paid to Stop & Shop in 1956 and the allowances to Elm Farm were discriminatory as to these other retailers.

Among the companies discriminated against were First National Stores, which operates about 180 stores in the Boston area; The Great Atlantic & Pacific Tea Company, operating about 100 to 125 stores in the Boston area; Star Market Company, with seven stores in the Boston area; and Supreme Markets, Inc., with about six stores in the Boston area. Respondents contend that since these companies made their purchases from Flotill through agents who had offices located in California, Flotill had no reason to know or believe that the goods would be shipped to Boston. Thus, respondents contend that these customers purchasing in California were not "customers" as that term is used in Section 2(d).

Respondents argue that The Great Atlantic & Pacific Tea Company and the First National Stores have retail outlets in many areas other than the Boston area; that these customers take title to the goods purchased from Flotill in California and are responsible for shipment to their various outlets. Sales are made to them f.o.b. Stock-
[fol. 89] ton, California. Flotill, of course, places the

goods in freight cars for shipment to the warehouses designated by the customers. It disclaims any knowledge as to where the products would be sold to consumers because of the possibility that the chain store customers might order the cars diverted to another destination while in transit.

But a seller is under an obligation to affirmatively offer or otherwise make available promotional allowances on proportionally equal terms to all customers who compete in the resale of its goods. This obligation entails whatever inquiry is necessary to establish whether customers in fact compete. If it were otherwise, sellers could avoid their obligations under the statute simply by closing their eyes to the obvious. A violation of Section 2(d) is determined by objective rather than subjective considerations. If the favored and nonfavored customers actually compete in the resale of the seller's goods, the Act may be violated without regard to the seller's knowledge of the lawfulness or unlawfulness of a disproportionate promotional allowance. To hold otherwise would recognize the right of a seller to discriminate in favor of or against any customer who conducts his resale operations in more than one trade area.

The hearing examiner found that Flotill was well acquainted with the Boston market; that Flotill was invoicing its products to the Boston area warehouses of these compaines; and on all shipments, whether immediately made or after a delay waiting for instructions, Flotill was aware of the destination of the goods. The hearing [fol.90] examiner additionally points out that the responsible Flotill official testified that a 1 percent promotional allowance was not offered to these nonfavored customers because he felt that "they couldn't use this particular type of promotion." On the basis of these and other record facts, it is our conclusion that The Great Atlantic & Pacific Tea Company and First National Stores were in fact nonfavored customers of Flotill, competing with the favored customers, Stop & Shop and Elm Farm, in the Boston area. The conclusion follows that the promotional payments to the latter two companies were discriminatory as to the former two companies and hence violated Section 2(d).

Respondents' contentions with respect to two of the other allegedly disfavored customers, Supreme Markets and Star Market, differ somewhat from those discussed above. These companies purchase from Flotill through the medium of Topco, a buying organization. In ordering from Topco, the customers did not particularly specify Flotill goods and their orders could have been filled by Topco with goods ordered from other canners. However, Topco's function appears to be largely that of a buying agent. As a matter of fact, the witnesses from Star and Supreme Markets so characterized it. After receiving an order from Topco for either Star or Supreme, Flotill ships the goods directly to the retailers and bills the retailers. These facts clearly demonstrate that Star and Supreme are customers of Flotill for the purposes of the Act, leading to the conclusion that the discriminatory payments to their competitors, Elm Farm and Stop & Shop, were unlawful. The hearing examiner's findings and conclusion with respect to this problem are correct and will be affirmed.

[fol. 91] In the proceedings before the hearing examiner, complaint counsel contended that Food Center Wholesale Grocers, Inc., a grocery wholesaler selling to retail stores in the Boston area, should be considered as a non-favored customer. Among Food Center's customers in 1956 and 1957 were three grocery supermarkets trading under the name New England Food Fair. Each of these three supermarkets was separately incorporated but each had the same officers, directors and stockholders as did Food Center Wholesale Grocers, Inc. It was complaint counsel's theory that this community of ownership, direction and control made Food Center in actual practice a retailer competing with the favored Stop & Shop and Elm Farm. The hearing examiner was not so persuaded, holding that Food Center was actually a wholesaler selling to many retail grocers, with only a relatively small proportion of its sales going to the Food Fair Stores. He concluded, "The circumstances disclosed by this record do not warrant a finding that the separate corporate organizations may be disregarded, and that Food Center was actually competing at the retail level through the Food Fair

Stores." He further held that there was no showing sufficient to bring the transactions within the indirect customer doctrine discussed by the court in American News Co. v. Federal Trade Commission, 300 F.2d 104 (2d Cir. 1962).

In their petition for review, complaint counsel indicated that they would not appeal this holding by the hearing examiner, but in their appeal brief they state that the Commission's intervening decision in Fred Meyer, Inc., [fol. 92] —— F.T.C. ——, Docket No. 7492, March 29, 1963, makes necessary such an appeal. In the Fred Meyer case, we held that wholesalers whose retailer customers compete with direct buying retailers are themselves in competition with such direct buying retailers in the distribution of the supplier's goods and that they are, therefore, entitled to proportionally equal allowances. The respondents have chosen not to brief this question, arguing that the point is not properly before the Commission since it was not raised in the petition for review. They cite our decision in Revlon, Inc., —— F.T.C. ——, Docket No. 7175, December 18, 1962, wherein we held that an exception which went beyond the questions stated in a petition for review was not properly before the Commission for determination. That decision was rendered under the Rules of Practice, issued and effective June 1, 1962, now superseded, which specifically provided in § 4.21(b) that exceptions to be briefed must be ". . . limited to the questions stated in the petition for review . . ." and, in § 4.21(c). "Material not included in the exceptions or brief may not be presented to the Commission in oral argument or otherwise."

As a practical matter we see no real need to resolve the factual and legal questions here presented. The Fred Meyer decision places these respondents, no less than any other interstate sellers, on notice that the Commission considers wholesalers whose customers compete with direct buying retailers to be in competition in the distribution of goods with the direct buying retailers. Thus, to comply with the order to cease and desist to be entered herein, the respondents must henceforth consider Food Center and all

[fol. 93] similarly situated wholesaler customers as customers within the scope and meaning of Section 2(d). Since we have not reviewed the hearing examiner's findings and conclusions on this point (findings 105 through 110), they will not be adopted as part of the Commission's decision.

The Remedy

Respondents object to the terms of the order to cease and desist, arguing that the order is too broad and does not spell out with sufficient definition and clarity the exact conduct prohibited. Orders to cease and desist must be drawn with sufficient scope to cover the myriad forms and procedures utilized by buyers and sellers. To prohibit with exactness only the conduct actually engaged in would invite avoidance of the order by minute changes in procedure. In the words of the Supreme Court:

> Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity. [Federal Trade Commission. v. Ruberoid Co., 343 U.S. 470, 473 (1952).]

[fol. 94] In our opinion, the hearing examiner's order dealing with the 2(c) aspect of this proceeding "does no more than prohibit the practices found to exist in this case and closely related acts, all of which are expressly prohibited by section 2(c)." Western Fruit Growers Sales Co. v. Federal Trade Commission, supra. Modification thereof would not be appropriate.

Likewise, while the 2(d) order issued by the hearing examiner is couched substantially in the terms of the statute, we believe that no extensive modification is required.

Section 2(d) deals with a relatively precise type of unlawful activity, discrimination in the granting of promotional allowances to competing customers. The only manner in which an order narrower than the terms of the statute can be framed is to limit its application to goods, parties, and geographic areas directly involved in the violation proved. In this matter such an order would require Flotill to cease granting Elm Farm and Stop & Shop promotional alowances on nondietetic canned fruits and vegetables unless a proportionally equal allowance is available to all other customers who compete in the distribution of such products in the Boston area. Such an order would clearly not protect the public interest, for it would be directed against specific past acts which may or may not recur rather than against an unlawful practice which may be resumed in a different area with different customers. Moreover, the respondents need not proceed with any new planned course of business activity at their peril, for under our procedures, as recently codified in the Rules of Practice effective August 1, 1963, "Any respondent sub-[fol. 95] ject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order." (§ 3.26(b), 28 Fed. Reg. 7080, 7091.)

The Individual Respondents

The complaint names Mrs. Meyer L. Lewis, Albert S. Heiser and Arthur H. Heiser in a dual capacity as individuals and as officers of the respondent corporation. The hearing examiner decided that there was no need to have the order to cease and desist run against the respondent persons excepting in their capacity as officers of the corporation and he dismissed the complaint as to them as individuals. Complaint counsel feel that this is error and have appealed. In this instance and on these facts we are inclined to agree with counsel.

The record reveals that the corporate respondent was completely controlled and was almost 100 percent owned by the three named respondents. During the relevant period of time Mr. Lewis owned 94.5 percent of the outstanding stock and her nephews, Albert S. and Arthur H.

Heiser, the other two individual respondents, each owned approximately $2\frac{3}{4}$ percent. Under such circumstances, when the corporation is merely the alter ego of individuals, we have generally felt that an order against the individuals is necessary. Fred Meyer, Inc., —— F.T.C. ——, Docket No. 7492, March 29, 1963. The reason for such decisions is obvious, for under those circumstances the corporation exists at the sufferance of its owners.

The hearing examiner held that the principal rule followed by the Commission in deciding questions of individ- [fol. 96] ual liability is to not attach such liability ". . . except upon showing of special circumstances which would indicate a likelihood that failure to do so may cause an evasion of the order against the corporation." While we feel that the hearing examiner has over-simplified the rationale of our numerous holdings on this question, the standard referred to is not an inappropriate one. But even under this standard we think these individuals should be subjected to the requirements of the order. While there is no indication that they desire to do so, the individual respondents have the absolute power to terminate the existence of this corporation at any time. A decision to abandon the corporation and continue operations as a partnership could be made for reasons entirely unconnected with this proceeding and without any intention of evading an order to cease and desist. This, however, could be the practical result, leaving the public with but doubtful protection against a resumption of the practice. On balance we believe that the public interest requires an order against the individual respondents in their individual capacity and we so hold.

An order affecting the decisions herein related will issue.

Commissioner Elman has filed a separate opinion. Commissioner MacIntyre dissented in part and has filed an opinion dissenting in part. Commissioner Reilly did not participate in the decision for the reason that he did not hear oral argument.

June 26, 1964.

[fol. 97]

* * * *

COMMISSIONER ELMAN:

I.

The Robinson-Patman Act was a product of concern with monopolistic tendencies in distribution. Large buyers, it was believed, were using their bargaining power to extort preferential price concessions from suppliers, thereby enhancing their power to dominate, and even destroy, small distributors compelled to pay higher prices for goods sold in competition with these large rivals. Congress considered that price discrimination should be forbidden where it reflected power, rather than efficiency, and where there was a danger of injury to competition or a tendency to monopoly. Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, embodies this basic legislative determination.

Congress was aware, however, that one of the reasons for the ineffectuality of the original Section 2 of the Clayton Act in preventing the growth of monopolies in [fol. 98] distribution was the existence of a number of subterfuges or artifices by which discriminatory discounts or allowances were passed off as transactions unrelated to price discrimination. Sections 2(c) through 2(e) were added to the Clayton Act by the Robinson-Patman Act in order to prevent 2(a) from being thus outflanked.

The Federal Trade Commission's investigation of chain stories had revealed that price discrimination was frequently accomplished through manipulation of brokerage.[1]

---

[1] The Commission's Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. 62-63 (1935), stated the problem as follows:

"Allowances for brokerage.—A number of the manufacturers in the grocery group stated that they give allowances in lieu of brokerage to certain chain customers. Some of these give this allowance only when the customer has a buyer at the producing center or shipping point, the amount of such allowance being equal to regular brokerage. Other manufacturers stated that they limit the payment of such allowance to a few large chain customers and then only in response to a demand. Such

Two practices in particular were involved. The first was [fol. 99] the practice of using "dummy" brokers.[2] A buyer would designate one of his employees as a broker and

---

allowances are not uniform as between chains. Where brokerage allowance is granted, some of the manufacturers allow cooperative chains 2½ percent, while they allow corporate chains a brokerage fee of 5 percent. The reason for this discrimination is that it is necessary to grant the larger discount to the corporate chains to obtain their business.

"Some manufacturers who distribute through brokers stated that they were required to pay brokerage not only to their brokers, but also to the chain purchasers. One manufacturer, however, stated that where it pays brokerage to one of the large chain-store purchasers, no brokerage is paid to its own broker. The chian involved has established a buying agency which holds itself out to be a merchandise broker. When the chain, through this buying agency, orders a car of the products of the manufacturer for delivery to one destination, the buying agency receives brokerage. If the manufacturer has a broker located in the territory to which the products are shipped, the broker receives no brokerage. However, when the buying agency of the chain orders a car of the products of the manufacturer for delivery to more than one destination, a mixed shipment, the brokerage is divided, the agency for the chain receiving one half and the broker into whose territory the shipment is destined receiving the other half of the brokerage fee."

[2] The legislative history of Section 2(c) is set out in some detail in F.T.C. v. Henry Broch & Co., 363 U.S. 166, 168-69:

"The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. A lengthy investigation revealed that large chain buyers were obtaining competitive advantages in several ways other than direct price concessions and were thus avoiding the impact of the Clayton Act. One of the favorite means of obtaining an indirect price concession was by setting up 'dummy' brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay 'brokerage' to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. But it was not the only means by which the brokerage function was abused and Congress in its wisdom phrased § 2(c) broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination."

insist that the seller pay this "broker" a specified "bro-
[fol. 100] kerage" fee. The "broker" then would remit the fee to his employer without having performed any brokerage services. The second practice with which Congress was concerned was closely related. A large buyer, rather than set up a "dummy" broker and require payment of "brokerage" to him, might simply demand a discount or allowance respecting or "in lieu of" brokerage.[3] Like the first practice, this was a method for extorting a brokerage fee or commission from the seller, not on account of brokerage services actually rendered, but as an indirect form of price discrimination. Congress sought, in Section 2(c), to deal with the first practice by forbidding brokerage payments to a party on the other side of the transaction where no services were rendered, and with the second by forbidding "any allowance or discount in lieu" of brokerage where such discount or allowance was not justified by any services rendered.[4]

[fol. 101] In either case, the prohibition contained in Section 2(c) was intended to be absolute. Congress was concerned with practices which it believed to be without any redeeming social or economic value—practies whose only purpose was circumvention of the price-discrimina-

---

[3] "In the Final Report on the Chain-Store Investigation . . . Congress had before it examples not only of large buyers demanding the payment of brokerage to their agents but also instances where buyers demanded discounts, allowances, or outright price reductions based on the theory that fewer brokerage services were needed in sales to these particular buyers, or that no brokerage services were necessary at all. . . . These transactions were described in the report as the giving of 'allowances in lieu of brokerage' . . . or 'discount[s] in lieu of brokerage.'" Broch, supra note 2, at 169, n. 5.

[4] Section 2(c) provides "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom the compensation is so granted or paid.".

tion law. Section 2(c) is a per se provision, and the per se category is ordinarily confined to "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal. . . ." Northern Pacific R. Co. v. United States, 356 U.S. 1, 5. (Emphasis added.) It is because the section is directed at practices which are inherently pernicious and unjustifiable that the ordinary defenses to a prima facie case of price discrimination are not available and that competitive injury need not be proved.

The corollary to this is that Section 2(c) applies only to transactions in which no brokerage services are actually rendered. Spurious, false, unearned brokerage is forbidden; but if a businessman performs a valuable and substantial service or function in the distribution of goods, [fol. 102] he is entitled to be compensated for it, and Section 2(c) does not apply. Edward Joseph Hruby, F.T.C. Docket 8068 (decided Dec. 26, 1962). That is so even if he is not a conventional broker yet performs services which in other situations are performed by brokers. Central Retailer-Owned Grocers, Inc. v. F.T.C., 317 F. 2d 410 (9th Cir. 1963). If price discrimination does not involve phony brokerage, but takes the form of an express, undisguised price reduction or discount, Section 2(c) has no application. A discrimination that has been forced into the open is dealt with not under 2(c) but under 2(a), the price-discrimination provision of the Act.[5]

---

[5] "If, after ceasing to employ brokers, a manufacturer improperly discriminates between customers, section 2(a) will accomplish the purposes of the act." Robinson v. Stanley Home Products, Inc., 272 F.2d 601, 604 (1st Cir. 1959). ". . . [T]he purpose of attaching per se illegality to the section 2(c), (d), and (e) prohibitions was precisely to force unearned commissions out in the open. False brokerage qua brokerage is absolutely forbidden. False brokerage qua 'a naked quotation in price' does not fall into the 'masquerade' category; rather it falls into the trap deliberately set for it by the law. Discriminatory concessions which cannot disguise themselves as brokerage or 'allowances' are thus forced to show their true character, and to be measured by the sections of the law dealing with discrimination." H.R. Rep. No. 2966, 84th Cong., 2d Sess. 97-98 (1956). See F.T.C. v. Simplicity Pattern Co., 360 U.S. 55, 68.

Thus, Section 2(c) has only a limited though important role to play in the enforcement of the Robinson-Patman Act. It is not a general regulation of brokers or other [fol. 103] intermediaries, or of methods of distribution. It was not intended to freeze the brokerage function at what it may have been in 1936, or to tell brokers whether they may buy and resell on their own account, or to prevent buyers from performing brokerage functions, or otherwise to discourage changes or innovations in traditional forms of distribution. It is not concerned with legitimate, bona fide transactions at all, but strictly with phony, unearned brokerage. The common characteristic of all transactions prohibited by 2(c) is that brokerage or other legitimate and valuable services in distribution are not performed.

To be sure, excerpts will be found in the Congressional debates on Section 2(c) indicating some confusion as to what was deemed to be "legitimate" brokerage.[6] Viewed as a whole, the brokerage payments and allowance with which Congress was concerned were payments and allowances of fake or dummy brokerage. The legislative history is replete with "assertions that the act would not inhibit the realization of savings based on genuine efficiencies",[7] and the statute as finally enacted expressly allows brokerage payments or allowances "for services rendered". As the Supreme Court has held, the provisions of the Robinson-Patman Act must be construed to harmo- [fol. 104] nize with overall antitrust policy. Automatic Canteen Co. v. F.T.C., 346 U.S. 61, 74. Section 2(c), therefore, cannot be invoked to insulate so-called independent brokers or any other class against competition from other businessmen performing genuine, not phony or sham, services in distribution, or in any other way to rigidify the channels of distribution and thereby discourage competition and economic progress.

---

[6] See H.R. Rep. No. 2951, 74th Cong., 2d Sess. 7 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15 (1936); 80 Cong. Rec. 9418 (1936) (remarks of Congressman Utterback). But see 80 Cong. Rec. 9420 (1936) (remarks of Congressman Celler).

[7] Note, 77 Harv. L. Rev. 1308, 1313 (1964). See H.R. Rep. No. 2287, 74th Cong., 2d Sess. 17 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936).

Despite confusion engendered by some early Commission and lower court cases,[8] the scope and limits of Section 2(c) are simple and clear. The function which 2(c) performs in the overall statutory scheme is, since the Supreme Court's landmark decision in Broch and the Commission and court cases following it, no longer open to doubt. In Broch, the Court plainly indicated that Section 2(c) has no application in any case where "the buyer rendered any services to the seller or . . . anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge." F.T.C. v. Henry Broch & Co., 363 U.S. 166, 173. Hruby and CROG (Central Retailer-Owned Grocers, Inc.) have already been mentioned. In the first, a buyer was permitted [fol. 105] to receive "brokerage" in compensation for the valuable services performed by him for the seller; in the second, a buyer, not a broker, was permitted to be compensated for services often performed by brokers. In Thomasville Chair Co. v. F.T.C., 306 F. 2d 541 (5th Cir. 1962), the court held that a savings in brokerage may lawfully be passed on by the seller to the buyer if the allowance reflects actual savings in distribution costs. And today, in Flotill, the Commission holds that an intermediary may lawfully be compensated for brokerage services even though he is the purchaser. (See pp. 9-11, infra.)

The effect of these decisions has been to restore Section 2(c) to its proper role in the scheme of the Robinson-Patman Act. Section 2(c) prohibits only three general types of transaction. The first is the payment of unearned brokerage to a dummy who renders no services and is controlled by the other party to the transaction. (See pp. 3-4, supra.) A variation of this would be where the dummy, in an attempt to mask a violation of the statute, performs only slight or nominal services which do not

---

[8] See, e.g., Modern Marketing Service, Inc. v. F.T.C., 149 F.2d 970 (7th Cir. 1945); Southgate Brokerage Co. v. F.T.C., 150 F.2d 607 (4th Cir. 1945); Webb-Crawford Co. v. F.T.C., 109 F.2d 268 (5th Cir. 1940); Biddle Purchasing Co. v. F.T.C., 96 F.2d 687 (2d Cir. 1938); Quality Bakers of America v. F.T.C., 114 F.2d 393 (1st Cir. 1940); Columbia River Packers Assn., Inc., 44 F.T.C. 118; Custom House Packing Corp., 43 F.T.C. 164; Ketchikan Packing Co., 44 F.T.C. 158.

entitle him to brokerage. In the second type of transaction to which 2(c) applies, the dummy is dispensed with entirely. The seller grants directly to the buyer an allowance or discount for, on account of, or in lieu of, brokerage, and no services are rendered by the buyer to the seller justifying the allowance, and no savings in distribution costs are effected.

The third type of transaction is that involved in the Broch case. There a broker was actually used in a transaction in which a discriminatory price concession was [fol. 106] granted by seller to buyer; and the broker, by accepting a reduction in the brokerage due him on the sale from the seller, helped defray the concession. The vice in such an arrangement is that if a seller is free in this manner to shift the burden of a discriminatory concession to another person, the broker, he obviously has less incentive to resist a powerful buyer's demand for preferential price treatment. If, on the other hand, the seller is absolutely forbidden to recoup such a discount or allowance from his broker, he is likely to put up more resistance to the importunings of large buyers seeking discriminatory price concessions. Section 2(c) closes the easy and inviting route to price discrimination which would be wide open if the seller could shift the cost of discrimination to a third person, the broker.

But Section 2(c) imposes no obligation on a seller to employ brokers on any or all of his sales.[9] Suppose that a seller uses brokers on most of his transactions, and, at the same time, certain buyers in the industry employ agents to actively seek out the sellers: If such an agent, rather than a seller's broker, is instrumental in bringing together seller and buyer, he has plainly rendered a valuable service to the seller as well as to the buyer; even if he is the latter's agent he is not barred by Section 2(c) from being compensated by the seller. In Broch, by way of [fol. 107] contrast, where a broker was used in the transaction, the buyer rendered no services to the seller, and

[9] "There is nothing in the bill that requires the employment of a broker; there is nothing to prevent sales direct from seller to buyer." 80 Cong. Rec. 9418 (1936) (remarks of Congressman Utterback). See Robinson v. Stanley Home Products, Inc., supra.

the brokerage allowance granted the buyer was therefore phony and unearned. Broch would have been decided differently if anything in the buyer's method of dealing had justified a brokerage reduction. In that event the reduction would have been lawful and could have been passed on to the buyer without violation of 2(c).[10]

II.

Applying the principles which I believe govern the interpretation and application of Section 2(c) to the facts of the present case, I agree that respondents' dealings with field brokers are not unlawful under Section 2(c). There are some 150 field brokers in the country, and until the commencement of the present action it was not suggested that the services they perform are unlawful. Not only is their function a useful and legitimate one; it is essential to the survival of small business in the canning industry. Large canners are able to ship directly in carload lots to food brokers (called "local brokers") located in the areas where their customers are, or to the customers, be they wholesalers or retailers, directly. Also, large canners are able to deal directly with local brokers because they maintain sales forces in the field. Small canners cannot distribute in this way. They lack adequate sales forces, and are unable to fill large orders or ship in carloads lots. If they are to compete at all with the large canners, they must have a method of pooling orders and [fol. 108] shipments and establishing contact with the local brokers. The traditional method of doing so has been through the use of "field brokers" located in the seller's area and familiar with the seller's needs and resources.

As the Chairman's opinion recognizes, the field broker performs an economically valuable and entirely ethical function as an intermediary. He is entitled to be compensated for it. It would be absurd to view the payment of compensation by small canners to field brokers as a sinister attempt to circumvent the price-discrimination law— the kind of thing at which Section 2(c) is aimed. Who, in

[10] See discussion of Broch and Thomasville, p. 7 of this opinion, supra.

this case, are the favored, and who the unfavored, buyers? Who is, or could be, injured by the field brokers' method of doing business? Where is there any threat to competition, or danger of monopoly? The field brokers perform useful services to small, independent canners; the field-brokerage system is a legitimate means by which the ability of such canners to compete with their large rivals is strengthened. To hold this system unlawful would impede, not advance, the policies of the Robinson-Patman Act.

The Chairman's opinion reaches the right result, however, by a curious route. The opinion assumes that, in their dealings with respondents, the field brokers actually take title to the goods, but concludes that such "technical title passage" is not "conclusive", but merely "incidental to the services performed by the field broker for the canner." (P. 7.) The opinion contrasts the "buying broker" [fol. 109] cases (e.g., Southgate Brokerage Co. v. F.T.C., 150 F. 2d 607 (4th Cir. 1945)), where "ownership of the goods vested absolutely in the brokers." (P. 6.)

But under Hruby (Edward Joseph Hruby, F.T.C. Docket 8068 (decided Dec. 26, 1962)), a bona fide independent intermediary, such as a field broker, is entitled to be compensated for his services even though he is a buyer and the parties denominate such compensation as "brokerage". It is therefore immaterial whether, in what sense, or to what extent the field broker acquires title to the goods. To make legality depend on whether his title is "incidental" or "absolute" is to introduce irrelevant and confusing standards into a law designed to deal with the realities of commercial transactions, not their superficial forms. As for the "buying broker" cases, they were decided not on the basis of the quantum of possession or the nature of the title enjoyed by the intermediaries, but, rather, on the simple, and in my opinion erroneous and [fol. 110] discredited,[11] notion that "brokerage" may in

[11] In discussing the effect of the Commission's application of Section 2(c) in general, and of the "buying broker" cases in particular, a former Chief Economist of the Commission, who is certainly not unfriendly to Robinson-Patman Act objectives, has stated:

"Viewed as a whole, the brokerage cases appear to include

no circumstances be paid by a seller to a purchaser or vice versa. By upholding the lawfulness of the brokerage payments to the field brokers, while recognizing that they are purchasers taking title to the goods on the sale of which they receive brokerage, the Chairman's opinion effectively cuts the ground out from under the old "buying broker" cases.

The sum and substance of the Commission's disposition of the field-broker issue is clear: the Commission no longer accepts the dogma that Section 2(c) forbids, in any and all circumstances, the payment of compensation in the form of brokerage for services rendered by a seller to a purchaser or by a purchaser to a seller. Since this dogma is the foundation of the buying-broker cases, their precedential authority has evaporated. So far as the buying-broker issue is concerned, the actual decision of the Commission in the instant case can only be regarded as confirming and strengthening Hruby, and as supporting the views expressed in Part I of this opinion.

III.

The finding that the 2½% allowance, labeled a promotional allowance, given by respondent to Nash-Finch was [fol. 111] an unlawful allowance in lieu of brokerage has an inadequate basis in the facts.

Respondent uses local brokers on some, but not all, of its sales. Since 1954, and, for all the record shows, for a much longer time, respondent has made almost all of its sales to Nash-Finch directly. Neither it nor Nash-Finch has employed brokers on such sales. The reason for the elimination of brokerage in these transactions appears to

---

many that did not express the central purposes of the Robinson-Patman Act and that had effects partly inconsistent with those purposes.

* * * *

In reducing the fluidity of the activities of buying brokers, several cases have substantially impaired the competitive strength of small wholesalers who are dependent on l.c.l. purchases and of the brokers who serve them, and probably have also weakened smaller producers in their competition with large producers." Edwards, The Price Discrimination Law 150-51 (1959).

be that respondent sells in such large quantities to Nash-Finch that the services of a broker are not needed. (The Chairman's opinion does not suggest that there is anything illegitimate about eliminating brokerage on such a ground, for, as mentioned earlier, nothing in Section 2(c) requires that a broker's services be used in any or all transactions.) In December 1955, Nash-Finch requested respondent to grant it a promotional allowance. Respondent agreed. The figure arrived at was 2½%, and this is approximately the brokerage rate which respondent would have had to pay if it had dealt with Nash-Finch through a broker. The record is silent on how the 2½% figure was arrived at.

These facts do not permit a finding that respondent granted an unlawful allowance in lieu of brokerage. As is conceded (Chairman's opinion, p. 10), this is not a situation, like Broch, in which the cost of a price concession (even assuming that the 2½% allowance should be regarded in that light) was shifted to the broker. The [fol. 112] broker was out of the picture long before the concession was conceived or made. Brokerage was eliminated in these transactions not because the buyer demanded that part of the seller's normal brokerage be deflected to him in the form of a discount or allowance, but because the parties found it economical to do business without a broker's services. (Cf. Thomasville.) There is, moreover, a far simpler explanation for the promotional allowance than that it was given on account of brokerage —namely, that it was given in consideration of promotional activities undertaken by Nash-Finch. I find insufficient indication in the record—and the Chairman's opinion stops short of suggesting—that the promotional allowance was not bona fide. While there may be circumstances in which a promotional allowance may be a forbidden allowance in lieu of brokerage (see, e.g., F.T.C. v. Washington Fish & Oyster Co., 282 F. 2d 595, 598 (9th Cir. 1960); Point Adams Packing Co., 55 F.T.C. 852), the circumstances of this case do not warrant the inference that the allowance to Nash-Finch was the result of the kind of brokerage manipulation at which the "in lieu" provision of Section 2(c) is directed.

In the Broch decision, the Supreme Court reminded the Commission: "This is not to say that every reduction in price, coupled with a reduction in brokerage, automaticlly compels the conclusion that an allowance 'in lieu' of brokerage has been granted. As the Commission itself [fol.113] has made clear, whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case. Main Fish Co., Inc., 53 F.T.C. 88." 363 U.S., at 175-76. The Main Fish decision, which the Supreme Court cited approvingly, had held that where the only evidence of a 2(c) violation consisted of a simultaneous reduction in sales price and in brokerage costs on the same transaction, a prima facie case was not established. It is clear both from the Supreme Court's language and from its reference to Main Fish that the Court will not sustain a finding that Section 2(c) has been violated where the only evidence is that the seller at once pays lower brokerage and charges a lower price on the same transaction. For an inference that the seller is passing on the brokerage discount to the favored seller by means of a price reduction to arise, "the Commission . . . may not rely solely on the fact that the seller has paid less brokerage on the sales at the lower price, but must establish a causal relationship between the reduced brokerage and the reduced sales price" (Thomasville Chair Co., F.T.C. Docket 7273 (Memorandum Accompanying Final Order Dismissing Complaint, October 22, 1963)), as was done in Broch.

In the present case, the elimination of brokerage was not even simultaneous with the granting of a concession, and both the elimination of brokerage and the granting of a promotional allowance to Nash-Finch are explicable without any reference to price discrimination—the first [fol. 114] because it was economical for the parties to do without a broker's services, the second because the seller received a quid pro quo (i.e., promotional efforts on behalf of its products) for granting the allowance.[12]

---

[12] "[A] lower price is not an allowance 'in lieu of' brokerage if it is causally conceived in considerations *other* than a saved commission or fee." Rowe, Price Discrimination Under the Robinson-Patman Act 341 (1962).

While the arithmetical equivalence between the brokerage reduction and the promotional allowance, and some of the other circumstances mentioned in the Chairman's opinion, are somewhat suggestive of a relationship between the reduction and the allowance, in my opinion they fall short, in the circumstances, of satisfying the Commission's burden of proof under Section 3(c).[13]

June 26, 1964.

[13] With respect to the other issues in the present case, I concur in the result.

[fol. 115]

* * * *

Opinion of Commissioner MacIntyre Dissenting in Part

I have voted for the order to cease and desist which the Commission is issuing today in this matter and I am, with one exception, in complete accord with the percipient opinion of Chairman Dixon. My sole difference with the Chairman stems from his handling of the allegation that respondents have paid illegal brokerage to field brokers. I feel that the record shows this charge to have been sustained and I would interpret the order to cease and desist as forbidding the continuation of such payments.

My beliefs in this respect do not stem from a failure to recognize the important and valuable function performed by field brokers in the distribution of canned foods but from a dogged conviction that there is a right way and a wrong way to conduct business affairs within the framework of the antitrust laws and I am unwilling to do violence to both facts and law in this or any other [fol. 116] proceeding in order to put the stamp of approval upon a practice which I know is per se illegal.

I have carefully examined the evidence of record and find myself in complete agreement with the findings and conclusions of the hearing examiner expressed in finding number 35, stricken by the Commission's final order. This finding reads:

> From the record as a whole, the conclusion seems clear that in the transactions here in question Flotill deals with the field brokers and not with the ultimate purchasers. It sells and invoices the merchandise to the field broker, extends credit to him, and looks only to him for responsibility in the transactions. It is believed that in these circumstances title to the merchandise passes from Flotill to the field broker, and that legally the field broker is "the other party" to the transaction. It would seem to follow, therefore, that, as contended by counsel supporting the complaint, in its transactions with field brokers

> Flotill pays brokerage to the other parties to such transactions in violation of Section 2(c) of the Clayton Act.

This conclusion by the hearing examiner who heard and considered all of the evidence and the additional facts that the wholesalers and retailers who buy Flotill goods from field brokers are not aware of the identity of the packer (much of the goods carries the field broker's private label)—see Initial Decision, Findings 27 and 28—all failed to have any impact on the Majority. To the contrary, the Majority holds that ". . . field brokers do not [fol. 117] purchase for their own account but function as intermediaries on behalf of Flotill in its sales to other parties . . .".

It seems to me that the decision to hold Flotill's transactions with field brokers lawful has been generated more by semantics and the "tyranny of words" than the substantive facts. I cannot escape the feeling that the appellation "field broker" has influenced the decision and perhaps even been determinative. In other words, I feel the decision would have been different if the enterprises in question had been known as "field distributors" or perhaps "field buyers." A person does not become a "broker" within the meaning of the Robinson-Patman Act by so calling himself, but by reason of his function. The facts here show the "field brokers" to be in actuality buyers and resellers and as such not legally entitled to receive brokerage.

As I stated above, my comments should not be interpreted as condemnation of the field broker's position in the food distribution industry. I hold no doubt that field brokers perform a useful and valuable function in assisting canners, and especially smaller canners, to bring their products to market. I suspect that the hearing examiner and Chairman Dixon recognize the legitimate and useful function of the typical field broker and are desirious of not interfering therewith. But much of Flotill's dealings with its field brokers was atypical in that sales were made to the field brokers with attendant title passage, leaving the field broker free to sell directly to wholesalers and retailers at speculative prices and without the aid of a

local broker. Under such circumstances, Section 2 (c) is clearly violated by the payment of brokerage.

[fol. 118] As I see it, a canner must make a selection. He can either sell to a field broker, granting him such functional discounts as the character of such buyer's resale warrants, or the canner may pay brokerage to the field broker, issuing his invoices and looking for payment to the wholesalers and retailers who buy and resell the goods. But the two systems cannot be blended without doing violence to the law. Also, to permit a buyer to receive brokerage on purchases made for its own account opens the door to abuse and discrimination.

These apparent prospective results have not deterred the Majority. Here the Commission is departing from the clear route of judicial interpretation of the statute. It is off on an uncharted course. It seems to be saying that in a single transaction a trader may act as a broker for the seller, a buyer, and as an intermediary or agent of those to whom the buyer resells, and still receive brokerage from the seller for handling the transaction. Indeed, this is a blending and mixing of functions and personalities. This blending and mixing will breed and make confusion inevitable. This action by the Commission cannot be accounted for except for the fact that it is in keeping with what some requested the Commission to do in the issuance of Trade Practice Rules for the Fresh Fruit and Vegetable Industry. But that is not a good reason for the Commission doing what it has done in this case. Here the Commission has dumped the problems involved into a heap and mixed them as one would the ingredients of a tossed salad. By so doing, it would appear that the Majority is looking ahead to doing something similar in the Fresh Fruit and Vegetable situation. Perhaps tossed sal-[fol. 119] ads are worthwhile products from fresh fruits and vegetables, but the mixing and blending of these legal problems in either this case or in any future handling of the proposed Trade Practice Rules for the Fresh Fruit and Vegetable Industry will help no one.

June 26, 1964.

* * * *

[fol. 132]

* * * *

BEFORE FEDERAL TRADE COMMISSION

ORDER DENYING RESPONDENTS' PETITION FOR RECONSIDERATION.—September 3, 1964

This matter has come on to be heard by the Commission upon respondents' petition, filed August 5, 1964, for reconsideration of that portion of the Commission's final order issued herein on June 26, 1964, which prohibits violations of Section 2(c) of the amended Clayton Act, and upon the answer of counsel supporting the complaint in opposition thereto.

In support of their petition, respondents assert that all members of the Commission should participate in the consideration of this case and that since the Section 2(c) provision of the order is supported by only two members of the Commission rather than a majority thereof, the order is not lawful.

[fol. 133] The fact that a vacancy existed in the Commission at the time of the issuance of this final order does not render the order invalid.[1] Of the four Commissioners serving at that time, three participated in the decision. These three participating Commissioners constituted a quorum for the transaction of business in accordance with the Commission's rules and in the absence of a statutory provision relating thereto. Drath v. Federal Trade Commission, 239 F. 2d 452 (D.C. Cir. 1956), cert. denied, 353 U. S. 917. A majority of a quorum is sufficient to sustain the validity of a final order of an administrative body. Frischer v. Bakelite Corp., C.C.P.A. (Patents), 39 F. 2d 247 (1930), cert. denied, 282 U. S. 852. Since two of the three participating Commissioners concurred in the issuance of the final order, respondents' argument on this point must be denied.

---

[1] Section 1 of the Federal Trade Commission Act provides, in part, that "A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission."

In further support of their petition, respondents contend, in effect, that a new question has been raised by the opinion for the reason that the evidence relied upon does not sustain the Section 2(c) provision of the final order. Respondents have submitted certain affidavits in support of this argument.

[fol. 134] The Commission has carefully considered respondents' argument and concludes that respondents have made no showing of any new questions upon which they had no opportunity to argue before the Commission, as provided in § 3.25 of the Commission's Rules of Practice.

Accordingly, It Is Ordered that respondents' petition for reconsideration of the Commission's decision and final order be, and it hereby is, denied.

By the Commission, Commissioner Elman not concurring.

/s/ Joseph N. Kuzew
JOSEPH N. KUZEW,
Acting Secretary.

Issued: September 3, 1964

[fol. 563]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19,521

FLOTILL PRODUCTS, INC., a corporation, MRS. MEYER L. LEWIS, ALBERT S. HEISER, and ARTHUR H. HEISER, individually and as officers of said corporation, PETITIONERS

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition to Review and Set Aside an Order of the Federal Trade Commission

OPINION—March 16, 1966

Before: BARNES and HAMLEY, *Circuit Judges;* and MATHES, *Senior District Judge*

BARNES, *Circuit Judge:*

This is a petition to review and set aside an order of the Federal Trade Commission against petitioners. The Federal Trade Commission had jurisdiction to conduct the proceedings below pursuant to section 11(a) of the Clayton Act, 15 U.S.C. § 21(a). This court has jurisdiction to review the order of the Commission pursuant to section 11(c) of the Clayton Act, 15 U.S.C. § 21(c), and section 5(c) of the Federal Trade Commission Act, 15 U.S.C. § 45(c).

Petitioners in this proceeding are Flotill Products, Inc., which in june 1961 changed its name to Tillie Lewis Foods, Inc., and Mrs. Meyer L. Lewis, Albert S. Heiser, and Arthur H. Heiser, the owner and officers of the cor-[fol. 564] porate petitioner. Flotill is a California corporation engaged in the processing, canning, and sale of certain fruit and vegetable items. Flotill also packs a line

of dietetic foods which were not involved in the proceedings below. Mrs. Lewis owns 94.5% of Flotill's stock and is its president and executive officer. Albert S. Heiser owns 2.744% of Flotill's stock and is its vice president in charge of sales. Arthur H. Heiser owns 2.748% of the Flotill stock and is its vice president in charge of production. The Heisers are nephews of Mrs. Lewis.

On August 6, 1958, the FTC issued a complaint against the corporate and individual petitioners, alleging violations of sections 2(c) and (d) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§ 13 (c), (d). The section 2(c) charges were founded on the conduct of Flotill in:

(1) Discontinuing the payment of a 2½% commission to the brokerage firm of Bushey & Wright, sometime prior to 1955, on sales made directly to the Nash-Finch Company, a large mid-western wholesale grocer, and the subsequent payment to Nash-Finch of a 2½% allowance for advertising and promotion which the FTC counsel contended were really payments "in lieu of brokerage" proscribed by section 2(c); and

(2) the payment by Flotill and Nash-Finch of ½% each to Bushey & Wright for work in arranging "pool car" shipments from Flotill to Nash-Finch of less than car-load lots which was instituted after Flotill had stopped paying Bushey & Wright the 2½% commission on its direct sales to Nash-Finch.

The section 2(d) charges were based on the discriminatory payment by Flotill of promotional allowances in 1956-1957 to Elm Farm Foods Company and Stop & Shop, Inc., retail grocers in the Boston, Massachusetts area, while not paying such promotional allowances to First National Stores, Great Atlantic & Pacific Tea Company, Star Market Company, and Supreme Markets, Inc., who were in competition with the "favored" customers in the Boston area.

Proceedings before a hearing examiner of the FTC began on July 7, 1959, but were delayed while the petitioners' refusal to comply with a subpoena duces tecum was being litigated. 6 F.T.C. Statutes and Court Decisions 665 (1959), *Flotill Products, Inc.* v. *F.T.C.*, 278 F.2d 850

[fol. 565] (9th Cir.), *cert. denied*, 364 U.S. 920 (1960). At the conclusion of resumed hearings, the hearing examiner issued his opinion on March 25, 1963, in which he sustained the section 2(d) charge and that portion of the 2(c) charge relating to discounts "in lieu of brokerage" to Nash-Finch, but found that petitioners' dealing with field brokers did not violate section 2(c) and that the persons named as respondents in the complaint should not be held in their individual capacities for the violations found to exist. Cross-appeals were taken from the hearing examiner's decision to the Commission, which issued its decision on June 26, 1964, upholding the hearing examiner's determination as to the 2(c) and 2(d) violations, but reversing his determination that the order to be entered should not apply to the individual petitioners as well as to the corporation.

Procedural questions arise as a result of the hearing before the Commission, in that the full Commission consists of five members but only three participated in the decision because there was one vacancy and one commissioner did not hear the oral arguments and did not join in the decision. The opinion for the Commission was written by Chairman Dixon; Commissioner MacIntyre wrote a separate opinion concurring with Dixon with the exception of the dismissal of the charge concerning dealings with "field brokers"; and Commissioner Elman filed a separate opinion in which he *concurred* in the result as to the 2(d) charge and the inclusion in the order of the corporate officers in their individual capacities, *agreed* with the result but differed on the reasoning as to the dismissal of the 2(c) charge insofar as it pertained to "field brokers" transactions, and *dissented* from the holding that the allowances which Flotill gave to Nash-Finch were "in lieu of brokerage and therefore violated section 2(c)."

Following the issuance of the Commission decision, petitioners here filed a petition for reconsideration before the Commission. Reconsideration was denied in an order issued September 3, 1964, in which the grounds for reconsideration were answered by the Commission. This petition to review and set aside the final order of the Commission followed.

I—*Alleged Procedural Defects.*

Petitioners contend that the Commission's order must be set aside as to both the section 2(c) and 2(d) orders [fol. 566] because at least three members of a five member commission must affirmatively vote for an order, and must vote for it on the same grounds, in order for it to become a valid order of the commission. Petitioners argue that this requirement was not met as to the section 2(c) order because only Commissioners Dixon and MacIntyre agreed to it and Commissioner Elman dissented, and was not met as to the section 2(d) order because Commissioner Elman's concurrence does not indicate that it was on the same grounds or relied on the same evidence as that relied upon by Dixon and MacIntyre.

First, as to the section 2(c) decision in which only two Commissioners agreed. We have examined the authority and arguments put forth by both parties and find ourselves in agreement with petitioners that, absent statutory authority or instruction to the contrary, three members of a five member commission must concur in order to enter a binding order on behalf of the commission. (Tr. 119) This was not done in the case of the 2(c) order here in dispute.

Respondent places primary reliance on the case of *Atlantic Refining Company* v. *F.T.C.*, 344 F.2d 599 (6th Cir. 1965). We agree that the language used by the court in that case is authority for respondent's position, but find ourselves unconvinced by the "succinct" disposal of the issue in that case. The court's entire treatment of the point here in dispute is contained in this statement:

> "As to other issues presented by petitioner, we can be more succinct. The rules of the Federal Trade Commission since its inception have provided for decision by the majority of panels of three members. We believe this rule is within the Commission's power to make and is wholly valid. Drath v. Federal Trade Commission, 99 U.S.App.D.C. 289, 239 F.2d 452 (1956), cert. denied 353 U.S. 917, 77 S.Ct. 666, 1 L.ed.2d 664 (1957)." (344 F.2d at 607.)

Petitioners correctly point out that the court in *Atlantic*

Refining both misconstrued the FTC rule [1] and relied upon a case, *Drath, supra,* which is not shown to be in point. In the *Drath* case the court expressed its approval of the [fol. 567] Commission rule that "A majority of the members of the commission shall constitute a quorum for the transaction of business." It does not appear that the order which resulted from a three man panel hearing the cause was concurred in by less than three, which would be a majority of the Commission. This did not raise the issue here in dispute. Since the statement from *Atlantic Refining* states a bare conclusion, and makes no attempt to support its position in reason, we are unenlightened as to why the court thought the "majority of the quorum" rule applicable or desirable.

We readily agree respondent's position is also supported by *Frischer & Co.* v. *Bakelite Corporation,* 39 F.2d 247 (C.C.P.A.), *cert. denied* 282 U.S. 852 (1930), wherein the Court of Customs and Patent Appeals stated that "the trend of modern authority is that in collective bodies other than courts, even though they may exercise judicial authority, a majority of a quorum is sufficient to perform the functions of the body." (39 F.2d at 255.) But the court then proceeds to support its statement with a series of state decisions dealing with town meetings and city councils, which frankly strike us as inapposite when we seek to determine the rule which is to govern decisions of a statutorily created administrative tribunal like the Federal Trade Commission.

Respondent has previously used this case, and the *Drath* case, *supra,* to support the authority of a two-man majority of a three-man quorum. *Borden Co.,* F.T.C. Docket No. 7474, April 10, 1964 (15 Pike and Fischer Administrative Law (2d) 344-5.)

Respondent seeks also to support its position by reference to section 1 of the Federal Trade Commission Act, 15 U.S.C. § 41, and to a rule of the FTC, 16 C.F.R. § 1.7. We do not consider this authority determinative. The pertinent provision in section 1 of the FTC Act (last sentence of first paragraph) states "A vacancy in the com-

---

[1] That rule states: "A majority of the members of the Commission constitutes a quorum for the transaction of business." 16 C.F.R. 1.7.

mission shall not impair the right of the remaining commissioners to exercise all the powers of the commission."[2] This provision only has the effect of authorizing action by less than the full commission; it does not provide that less than a majority of the full commission may enter a final order, for in the event of a single vacancy a majority of [fol. 568] the remaining commissioners is still three. The FTC rule, referred to earlier in the *Atlantic Refining* case, *supra*, provides that "A majority of the members of the Commission constitutes a quorum for the transaction of business." We could, perhaps, agree that the reasonable construction of such a rule would be that a majority of the quorum would be sufficient to render a decision, but do not find that argument dispositive in the absence of a clear showing that the FTC regulation is within the power of the FTC to adopt, tested in the light of the extent of the power conferred upon the FTC by Congress. Respondent stresses the fact that such a rule has been in effect for forty years. We cannot believe that a long adherence to an improper rule (if indeed it is improper) gives the Commission any vested right to continue such adherence. As petitioners accurately point out, when Congress wanted to authorize the exercise of the powers of an administrative body by less than the full body in other situations, it did not lack the words to do so expressly. Cf. National Labor Relations Board, 29 U.S.C. § 153(b); Interstate Commerce Commission, 49 U.S.C. § 17(1).

We do not desire to overstate our agreement with petitioners in this matter, and therefore we have stated that respondent's position is not without support. As already noted, the *Atlantic Refining* and *Frischer* cases, *supra*, directly support that position, and *Drath*, *supra*, may be said to do so inferentially. It might also be argued, although respondent has not done so, that the express permission of Congress to the NLRB and the ICC to delegate its authority to panels, and congressional acquiescence in the FTC quorum rule for a long period reflects congressional approval of such a policy of expediting the work of

---

[2] We note the reference in the Act is singular and not plural. Suppose there were plural vacancies? Would respondent contend that if there were four vacancies one member could act?

administrative bodies. On the other hand, both of the bodies to whom such permission was expressly granted are larger than the FTC and it is difficult to believe that Congress conceived of the five member FTC with its politically balanced make-up, permitting two of its members to speak for the Commission.

Respondent puts forth an additional argument, which we believe merits consideration: that "the necessity of administrative agencies fashioning their own procedural rules as well as their authority to do so has long been recognized by the courts. See *Federal Communications Commission* v. *Schreiber*, —— U.S. ——, 85 Sup.Ct. 1459, 1467 (1965), and cases cited therein." While we agree [fol. 569] with the general proposition stated by respondents, we are not assured that it controls the point in dispute here. The *Schreiber* case, for example, dealt with the interpretation of section 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(j). That legislative action expressly granted to the FCC a measure of autonomy in determining its own procedures. Not only is such a specific grant of power lacking in the Federal Trade Commission Act, but the type of "procedural rules" referred to in *Schreiber* were not of the same nature as the quorum requirement here in dispute. The *Schreiber* case, and a number of cases cited therein, particularly *Wallace Corporation* v. *N.L.R.B.*, 323 U.S. 248 (1944), *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501 (1943), and *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), do, as respondent states, refer to the broad powers of administrative bodies in determining their own procedural rules. But in each of these cases the power of the administrative body to do so is premised on its expertise in dealing with one particular specific industry which it was designed to regulate. We do not quarrel with the propriety of administratively determined procedures in such cases, but do not believe that that same principle is applicable in this case *where the problem relates to the interpretation of the FTC's enabling legislation.* We do not think it proper for this court to amend the Federal Trade Commission Act nor to permit it to be amended by a Commission rule, in the absence of a stronger showing

of congressional intent than has been made here, and in the presence of express provisions in the enabling legislation creating other agencies (such as the NLRB and ICC) to accomplish the result sought.

In light of the Commission's adherence to its "majority of a quorum" rule for such an extended period, we do not believe that the proper remedy would be to simply set-aside or deny enforcement of its section 2(c) order. Rather, we remand the section 2(c) violation to the Commission for further hearings to determine whether a majority of the Commission desire to enter such an order. We express no doubt as to the validity of the Commission's practice of conducting hearings before less than the full membership. We say only that an order of the Commission must be supported by three members in order to constitute an enforceable order of the FTC. Two of five is too few.

[fol. 570] For the above reasons, we will remand, and await a further determination by the FTC before considering the facts and law relating to the alleged section 2(c) violations.

Petitioners assert that the order regarding the section 2(d) violation should also be denied enforcement because Commissioner Elman concurred in the result, but did not enumerate the grounds for his concurrence, nor the conclusions or findings upon which he based his concurrence, and that consequently "the Commission has provided no 'statement of . . . findings and conclusions' nor 'reasons or basis therefor' as required by Section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 1007(b)." We cannot agree. We approve the reasoning of the three judge district court in *Chicago, B. & Q. R. Co. United States*, 60 F.Supp. 580 (E.D. Ky. 1945) where the court was faced with a similar contention in reviewing a freight rate order of the ICC. While petitioner argues that no grounds to support his concurrence can be taken from Commissioner Elman's simple statement following his section 2(c) dissent that "With respect to the other issues in the present case, I concur in the result" (Record, p. 114, n. 13), we believe it more reasonable to assume that his statement constituted a substantial adoption of Chairman Dixon's opinion for the Commission as to the 2(d)

violations. As stated by the court in *Chicago, B. & Q. R. Co., supra,* "We interpret the statement by the fifth Commissioner that he 'concurs in the result' of both reports filed in this case to mean that, while he does not assent to all the comments or observations made therein, he is, nevertheless, sufficiently in accord with the rationale of them to enable him to agree . . . ." 60 F.Supp. at 583.

II—*Promotional Allowances.*

All three Commissioners who participated in the Flotill proceedings agreed that Flotill had violated section 2(d) in two particulars. First, by not making available to Stop & Shop in 1956 and 1957 the same promotional allowance which it made to Elm Farm Foods, a competitor of Stop & Shop in the Boston area, and second, by not making available any similar promotional allowance to customers who competed in the Boston area but who made their purchases in the "California Street" market and shipped [fol. 571] the goods to Boston rather than buying through brokers in Boston as Elm Farm Foods and Stop & Shop did.

Petitioners attack the first section 2(d) charge by asserting that Stop & Shop, which did not receive the allowance in 1957, had received ~~such~~ an allowance in 1956 and did not consider the availability of a promotional allowance from Flotill in determining whether to promote Flotill items, and that Flotill was not obligated to make a futile gesture by paying a promotional allowance where there was no consideration and when the payment of such allowance did not result in the increased promotion of its products.

Petitioners attack the findings supporting the second 2(d) violation by asserting (a) that it had no obligation to pay equivalent allowances for promotion in a local area to customers who choose to purchase in different markets thousands of miles apart; (b) that it had no way of knowing the ultimate destination of the goods purchased in the California Street market and hence is not chargeable with knowledge that the goods would be sold in competition with those sold by Flotill to Elm Farm Foods and Stop & Shop; (c) that in any event the allegedly "disfavored"

purchasers were not "direct customers" of Flotill in Boston and thus Flotill was under no obligation to pay them a promotional allowance equivalent to the one paid all customers buying through its Boston broker to promote Flotill products in Boston; (d) that the Commission erred in including Food Center Wholesale Grocers, Inc., in the coverage of the cease and desist order in reliance on the Commission's holding in *Fred Meyer*, Dkt. No. 7492 (March 29, 1963),[3] without reversing the hearing examiner's decision excluding Food Center Wholesale Grocers, Inc. from consideration as a "disfavored" competing customer, and finally (e) that Commission counsel failed to sustain the burden of proving that customers who did not receive the promotional allowance were in competition with customers who did receive such allowances.

First, as to the discrimination between Elm Farm Foods and Stop & Shop in 1956 and 1957, we find substantial evidence on the record as a whole that an offer of a promotional allowance to Stop & Shop would not have been a "futile gesture," as petitioners contend, and that petitioners have not complied with and in fact have misconstrued the provision in the Federal Trade Commission Guides for Allowances and Service, 1 Trade Reg. Rep. § 3980, that a seller make a specific offer of a promotional allowance to meet the "availability" standard of section 2(d).[4] Accordingly, we believe that this portion of the 2(d) order is entitled to enforcement.

[fol. 572]

---

[3] That order held that the Commission considers wholsalers whose customers compete with direct buying retailers to be in competition in the distribution of goods with the direct buying retailers.

[4] Section 2(d), 15 U.S.C. § 13(d):

"(d) *Payment for services or facilities for processing or sale.* It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

Second, the Commission's findings that Flotill knew or should have known that the goods sold to the four "disfavored" customers were intended for sale by the purchasers in the Boston area is supported by substantial evidence. The record shows that though these sales were negotiated in San Francisco, *all were billed and shipped by Flotill to the retailers in the Boston area*, and the testimony of Albert S. Heiser indicates that Flotill knew that it was making sales to the "disfavored" four in the Boston area. Furthermore, we agree with Chairman Dixon's contention that petitioners were under an obligation to determine whether customers in fact compete, and that "If it were otherwise, sellers could avoid their obligations under the statute simply by closing their eyes to the obvious." (R. 89.) Nor can we agree with petitioners' contention that Commission counsel failed to sustain the burden of proving that customers who did not receive the promotional allowance were in competition with customers who did. While we tend to believe that the hearing examiner's determination that "The competitive retail grocery market represented by the Boston area, as used herein, may be loosely defined to include an area within a radius of approximately 25 to 50 miles of the center [fol. 573] of Boston," was a little too "loose" to be of much value, the record contains substantial evidence regarding the number and location of the retailers involved, and credible testimony from the grocery buyers of the firms involved, to establish that the six firms were in competition with one another in the Boston area. Further, in defining the requirements of the competitive market definition which must be made to show a violation of section 2(d), we adhere to the statement of Judge Hamley in *Tri-Valley Packing Association* v. *F.T.C.*, 329 F.2d 694, 708 (9th Cir. 1964) that "In our opinion, where a direct customer of a seller, operating solely on a particular function level such as wholesaling or retailing, receives a promotional allowance not made available to another direct customer operating solely on the same functional level, it is unnecessary to trace the seller's goods of like grade and quality to the shelves of competing outlets of the two in order to establish competition."

We find the treatment of Food Center Wholesale Grocers, Inc., more troubling. After pointing out that the hearing examiner dismissed the charge that Food Center Wholesale should also be viewed as a "disfavored customer," Chairman Dixon went on to state:

> "As a practical matter we see no real need to resolve the factual and legal questions here presented. The Fred Meyer decision places these respondents, no less than any other interstate sellers, on notice that the Commission considers wholesalers whose customers compete with direct buying retailers to be in competition in the distribution of goods with the direct buying retailers. Thus, to comply with the order to cease and desist to be entered herein, the respondents must henceforth consider Food Center and all similarly situated wholesaler customers as customers within the scope and meaning of Section 2(d). Since we have not reviewed the hearing examiner's findings and conclusions on this point (Finding 105 through 110), they will not be adopted as part of the Commission's decision." (R. 92-93.)

We note that the *Fred Meyer* decision is now before this court for review (*Fred Meyer, Inc.* v. *F.T.C.*, No. 18,903), that petitioners contend that earlier decisions of this court hold squarely against the Commission's decision in *Fred* [fol. 574] *Meyer* (Cf. *Tri-Valley Packing Association* v. *F.T.C.*, *supra*, pp. 709-10; *Alhambra Motor Parts.* v. *F.T.C.*, 309 F.2d 213 (9th Cir. 1962)), and that the Commission did not even review the findings regarding Food Center. In light of these facts we consider it improper to include Food Center and other wholesale customers within the scope of the cease and desist order, for, though Chairman Dixon is correct in stating that petitioners have the same notice of the Commission's position as all other sellers as a result of the *Fred Meyer* decision, not all other sellers are subject to contempt proceedings for violation of that order as Flotill would be if Food Center and other wholesalers were included in the cease and desist order without the hearing examiner's findings on the point even having been reviewed. Although the remedial

order is broadly framed and does not make reference to specific customers, we think it best to make clear that on the record in this case, the prohibition shall not be understood to extend to Food Center and other wholesalers.

III—*Scope of the Order.*

Petitioners direct two attacks against the drafting of the final order of the Commission. First, that it must be limited to the corporation and not extend to the named officers of the corporation, and second, that the order must be limited in scope and definitive in its terms.

In regard to the first ground of attack on the order, we note that the hearing examiner dismissed the complaint as to the Flotill executives in their individual capacities, finding that the corporate organization was stable and not a sham, and that "There is no showing and no suggestion of any special circumstances which would indicate a likelihood that the individual respondents would cause an evasion of any order which may be entered herein against the corporation." (R. 19.) In framing the order to include the individual petitioners, Chairman Dixon relied on no other fact than that the three individuals owned and controlled the corporation. He concluded: "Under such circumstances, when the corporation is merely the alter ego of individuals, we have generally felt that an order against the individuals is necessary." (R. 95.)
[fol. 575] We find that the Commission has abused the discretion granted it in framing the order to include the individual petitioners. The rather cavalier use of the "alter ego" doctrine finds no support in the record, and the order points to no evidence to challenge the findings of the hearing examiner that the corporate entity has ever been used in such a way as to justify treating it as the "alter ego" of its owners. We agree with petitioners that naming them individually in the order is tantamount to a finding on the evidence that they have personally violated, or can be expected to violate, the Clayton Act. We have not been shown the evidence in the record, if any there be, which supports such a conclusion. Accordingly, the Commission order to be enforced should not refer to the petitioners in their individual capacities. Authority

for such deletion is to be found in *Coro, Inc.* v. *F.T.C.*, 338 F.2d 149 (1st Cir. 1964) and *Rayex Corp.* v. *F.T.C.*, 317 F.2d 290 (2d Cir. 1963).

Petitioners' attack on the scope and particularity of the balance of the final order is largely without merit. A great deal of discretion has been vested in the FTC as to how best to remedy industry abuses, and the Commission is not limited to prohibiting merely the precise acts which have already occurred. *Jacob Siegel Co.* v. *F.T.C.*, 327 U.S. 608 (1946); *F.T.C.* v. *Henry Broch & Co.*, 368 U.S. 360 (1962). Accordingly, the rest of the language of the order is held proper.

Enforcement of the order of the Federal Trade Commission is ordered to the extent that the order relates to the section 2(d) violations, with the reference to petitioners in their individual capacities deleted. Enforcement of the order as it relates to the section 2(c) violations is denied. The matter is remanded to the FTC for further proceedings to determine whether a majority of the Commission join in the section 2(c) findings.

HAMLEY, *Circuit Judge* (Dissenting in Part):

I dissent from that part of the majority opinion which holds that at least three members of respondent Commission must affirmatively vote for an order, and since this requirement was not met with regard to the section 2(c) violation, that part of the proceedings must be remanded. [fol. 576] I think it is too late in the day to raise this question. The Commission rule (16 C.F.R. 1.7) providing that a majority of the members of the Commission constitutes a quorum for the transaction of business, has been in effect for forty years. The reasonable construction of that rule is that a majority of the quorum would be sufficient to render a decision. It has been so construed by the Commission for a very long time. Congress has not seen fit to negate that construction by enacting legislation expressly prohibiting the Commission from acting through a majority of a three-member quorum.

I concur in the remainder of the majority opinion.

[fol. 577]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19,521

[File Endorsement Omitted]

FLOTILL PRODUCTS, INC., a corporation, et al., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

FINAL DECREE—March 31, 1966—Filed April 1, 1966

Petitioners herein having filed in this Court on September 10, 1964, a petition to review and set aside an order to cease and desist issued against them on June 26, 1964, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Flotill Products, Inc., a corporation, Mrs. Meyer L. Lewis, Albert S. Heiser, and Arthur H. Heiser, individualy and as officers of said corporation, Docket No. 7226," and the matter having been heard by this Court on the record and briefs on October 13, 1965, and this Court having rendered its decision on March 16, 1966;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid order to cease and desist be, and it hereby is, modified to read as follows:

IT IS ORDERED that respondent Tillie Lewis Foods, Inc. (formerly Flotill Products, Inc.), a corporation, its officers, agents, representatives and em-[fol. 578] ployees, directly or indirectly, through any corporate or other device, in or in connection with the sale of canned fruits and vegetables in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

1. Paying or contracting for the payment of anything of value to or for the benefit of any customer

of respondent as compensation or in consideration for any services or facilities furnished by or through such customer, in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products with the favored customer.

IT IS FURTHER ORDERED that respondent, Tillie Lewis (formerly Flotill Products, Inc.) shall, within 60 days after entry of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist set forth herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that enforcement is denied of the Commission's Section 2(c) order and that that matter is remanded to the Federal Trade Commission for further hearings to determine whether a majority of the Commission desires to enter such an order.

/s/ Stanley N. Barnes

/s/ Frederick G. Hamley

/s/ Wm. C. Mathes
United States Circuit Judges

DATED: March 31, 1966.

[fol. 591] BEFORE THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19,521

[File Endorsement Omitted]

FLOTILL PRODUCTS, INC., ET AL., PETITIONETS

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition to Review and Set Aside an Order of the Federal Trade Commission

EN BANC ORDER—Filed August 15, 1966

Before: CHAMBERS, BARNES, HAMLEY, JERTBERG, MERRILL, KOELSCH, BROWNING, DUNIWAY and ELY, *Circuit Judges.*

Per curiam:

The court en banc takes the case solely for the purpose of deciding "When is a majority a majority?".

The opinion of Judge Barnes is amended as follows: To the second paragraph on page 229 of 358 F.2d, after 49 U.S.C. § 17(1), is added: "Federal Power Commission, 16 U.S.C. § 792." In the third paragraph on page 229, the last sentence thereof is stricken, and substituted therefor is the following: "On the other hand, it is difficult to believe that Congress conceived of the five-member FTC with its politically balanced make-up, permitting two of its members to speak for the Commission, and failed to specifically provide enabling legislation."

[fol. 592] Judges Chambers, Jertberg, Koelsch and Duniway concur in the opinion of Judge Barnes as so modified.

Judges Merrill, Browning and Ely concur with Judge Hamley in his dissent.

RICHARD H. CHAMBERS
STANLEY N. BARNES
/s/ Frederick G. Hamley
GILBERT H. JERTBERG
/s/ Charles A. Merrill
M. OLIVER HAMLIN
/s/ James R. Browning
/s/ Ben. C. Duniway
WALTER ELY
United States Circuit Judges

[fol. 593]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 594]

SUPREME COURT OF THE UNITED STATES

No. 668, October Term, 1966

FEDERAL TRADE COMMISSION, PETITIONER

v.

FLOTILL PRODUCTS, INC., ET AL.

ORDER ALLOWING CERTIORARI—April 17, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted., and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 263802 913